**A & W Products Company, Inc. *and* Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 2-CA-15621

April 15, 1982

## SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 19, 1981, Administrative Law Judge James F. Morton issued the attached Supplemental Decision[1] in this proceeding. Thereafter, the Respondent filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, A & W Products Company, Inc., Port Jervis, New York, its officers, agents, successors, and assigns, shall pay the employee listed below the sum opposite her name, with interest thereon as computed in the Administrative Law Judge's Supplemental Decision, with appropriate deductions for taxes required to be withheld by the Respondent under Federal and state laws:

| | |
|---|---|
| Mariel Uhrig | $4,599.68 |

[1] The initial Decision is reported at 244 NLRB 1128 (1979).

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: A hearing in this case was held before me on August 27, 1981, in New York, New York, to determine the amount of backpay for Mariel Uhrig which would make her whole for her losses resulting from her discharge on June 26, 1978, which was found to be unlawful by the Board in its decision and order issued on September 17, 1979.[1]

Upon the entire record in this case and from my observation of the demeanor of the witnesses, and with careful consideration of the brief submitted on behalf of General Counsel and Respondent, I make the following:

### FINDINGS OF FACT

#### I. ISSUES

A. Would Uhrig have worked but several days during the backpay period had she not been discriminated against?

B. Was Uhrig unable to work for an appreciable part of the backpay period because of illness?

C. Did Uhrig incur a willful loss of earnings?

#### II. THE EVIDENCE

##### A. *Background*

In its decision, the Board had determined that Respondent, by its vice president and manager, Karl Augustin, discharged Uhrig on June 26, 1978, because she had filed a grievance. The Board also held that the reason advanced by Respondent for discharging her (that she had breached Respondent's honor system in failing to report an error made in determining the amount of her production work) was a clear pretext. Respondent now contends that Uhrig, in any event, would have been laid off, on and since June 26, 1978, from her job as a machine operator as there was no work for her. In particular, it asserts that since June 26, 1978, it has had virtually no orders for the items she was qualified to work on. I note initially that Respondent did not contend at the first hearing in this case before Administrative Law Judge Miller in December 1978 that Uhrig had been let go on June 26, 1978, because there was no work for her. I also observe that Uhrig has been working steadily for Respondent since her reinstatement on April 19, 1979, notwithstanding the continuing absence of orders for items, as to which she had demonstrated as of June 1978 her ability to produce in quantity.

Respondent further asserts that during the years she worked for Respondent Uhrig had been absent for prolonged periods due to illness and Respondent contends that it is thus fair to hold that she had been unable to work due to illness for a much larger period than the 10 days (January 7-16, 1979) allotted therefor in the backpay formula propounded by the General Counsel.

Lastly Respondent had questioned whether Uhrig fairly sought interim employment. In all other respects, it concedes the appropriateness of the backpay formula used by the General Counsel.[2]

The decision issued by Administrative Law Judge Miller in this case on April 6, 1979, describes Respondent's operations and it is unnecessary to restate that description.

[1] 244 NLRB 1128.

[2] The General Counsel, in his brief, conceded that the vacation pay due Uhrig should be reduced from $441.60 by $176.64 as Uhrig had received payment of the latter amount.

B. *Whether Work With Respondent Was Available for Uhrig During the Backpay Period*

Respondent makes and sells small office supply items, such as rulers and clipboards. Uhrig, as a machine operator with Respondent, made clips and other parts. As of the date of her discriminatory discharge, June 26, 1978, she was proficient in performing operations coded by Respondent as #39 Clip Assembly, #361 Assembly, #22 S&C, #1039 Clip Assembly, and Swedge #15 Globes. On the day she was discharged, she was being trained for other jobs. Respondent submitted documentary evidence in an effort to demonstrate that from June 26, 1978, until Uhrig was reinstated, Respondent had virtually no orders for, and hence did not produce, the items for which Uhrig had demonstrated proficiency; i.e.,—jobs #39 Clip Assembly, etc. The records it submitted, however, disclosed that an operator with less seniority than Uhrig had regularly worked in late 1978 and early 1979 on jobs for which Uhrig was qualified. Respondent endeavored to explain that circumstance away by offering testimony that that less senior employee was assigned to a separate department. That department consisted of only that employee. I reject that explanation. In any event, for the reasons discussed below, the basic contention of Respondent is flawed.

The records offered by Respondent indicated that upon the return of Uhrig to work for Respondent on April 19, 1979, she resumed her training on other jobs and that she has since "made quota" on then. Those jobs are described in the record by the code used in Respondent's operations and are thus identified as jobs OP-12, 21/2S, 3S, #1 and #2. There is no contention by Respondent that Uhrig would not have been able to qualify for those same jobs had her training in June 1978 not been interrupted by her discriminatory discharge then. In fact, Administrative Law Judge Miller's decision indicates that her training was being discontinued on one job on June 26, 1978, and there was no suggestion then that she would not be trained on another machine, pursuant to the cross-training procedures then being used. Neither is there a contention by Respondent that she would not have worked on those other jobs during her backpay period in the same manner she worked on them since her reinstatement.

Respondent's contention that there would have been no work for Uhrig on and after June 26, 1978, has no factual basis to support it. If there were any merit to it, Respondent undoubtedly would have raised it before Administrative Law Judge Miller as a basis for terminating Uhrig on June 26, 1978, rather than the reason it did advance then. I find that the length of the backpay period set out in the backpay specification is appropriate.

C. *The Days To Be Excluded From the Backpay Period Due to Uhrig's Illness*

The backpay specification excluded from the first quarter of 1979, the workdays, January 7 to 16. This was done on the premise that Uhrig was unable to work on those days due to illness. At the hearing, Uhrig testified that she was very ill in that 10-day interval and it is fair to conclude that she would then have been absent from work for that time had she then been working for Respondent.

Respondent placed into evidence records as to her work attendance in the years she has worked for it and also medical data obtained from Uhrig. Respondent calculates that as she has averaged 40 days absent a year due to illness, it is fair to prorate that average for the backpay period to exclude therefrom 33 days because of illness. I am not sure that that is a fair projection as, in one of the years since her reinstatement, Uhrig was absent for 115 days, mostly because of a serious operation.

I find that Uhrig's testimony is entirely credible and that the only time she would have been unable to work during the backpay period due to illness was the interval, January 7 to 16, 1979. Respondent has urged that the medical data she furnished controverted her own testimony as to her medical history. She explained, however, that one of the dates in a letter summarizing her extensive medical history was an error and she testified that the correct data was 1979, not 1978. I accept her statement as true and do not view the different data in the letter as grounds to discredit her entire account.

I thus find that the backpay formula properly omitted only time from January 7 to 16, 1979, that Uhrig would not have been working for Respondent, had she not been unlawfully discharged then.

D. *The Alleged Willful Loss of Earnings*

Respondent indicated at the hearing that Uhrig did not make a reasonable search for employment during the backpay period and thereby forfeited her claim to backpay. In its brief, Respondent did not allude to that contention. It may be that it has abandoned it but Respondent has not so stated at any time since it raised the issue.

In any event, there was no proof offered to support that assertion.

Uhrig's testimony, which I credit, establishes that she sought work as a machine operator, as a clerk, and as an unskilled worker (in short, in any available job) at numerous places of business in and around the Port Jervis, New York, area where she lived. She also applied at plants located in Pennsylvania, 16 miles from her home and reported to the state unemployment office every 2 weeks for job referrals.

In determining whether an employee has forfeited backpay, the following legal principle is applicable:[3]

> An employer may mitigate his backpay liability by showing that a discriminatee "willfully incurred" loss by "clearly unjustifiable refusal to take desireable new employment," (*Phelps-Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, 199–200 (1941)), but this is an affirmative defense and the burden is upon the employer to prove the necessary facts. *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (C.A. 5, 1966). The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or a low interim

[3] *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644, 646 (1976). See also *Sioux Falls, Stock Yards Company*, 236 NLRB 543 (1978).

earning; rather the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575–576 (C.A. 5, 1966). Moreover, although a discriminatee must make "reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable exsertions in this regard, not the highest standard of diligence." *N.L.R.B.* v. *Arduini Manufacturing Co.*, 394 F.2d 420, 422–423 (C.A. 1, 1968). Success is not the measure of the sufficiency of the discriminatees' search for interim employment; the law "only requires an honest good faith effort." *N.L.R.B.* v. *Cashman Auto Company and Red Cab Company*, 233 F.2d 832, 836 (C.A. 1). And in determining the reasonableness of this effort, the employee's skill and qualifications, his age, and the labor conditions in the area are factors to be considered *Mastro Plastic Corp.*, 136 NLRB 1342, 1359.

I find that Respondent has not shown that Uhrig incurred a willful loss of interim earnings.

### CONCLUSION OF LAW

The backpay formula as propounded by the General Counsel is appropriate in determining the moneys due Uhrig to make her whole for losses incurred by her as a result of the discrimination practiced against her from June 26, 1978, to April 19, 1978.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

### ORDER[4]

Respondent, A & W Products Conpany, Inc., its officers, agents, successors, and assigns, shall make whole Mariel Uhrig by paying her the sum of $4,599.68[5] plus interest thereon in the manner heretofore prescribed in this case.

---

[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[5] The quarterly amounts are:

| | |
|---|---|
| 2d Q., 1978 | $ 112.64 |
| 3rd Q., 1978 | 1,520.64 |
| 4th Q., 1978 | 1,182.72 |
| 1st Q., 1979 | 1,056.00 |
| 2d Q., 1979 | 727.68 |
| Total (Including Pension payment and Vacation Pay) | $4,599.68 |